

DISCUSSION KICK-OFF

Which Rights to enforce in Time of Public Emergency?

The European Court of Human Right's approach towards International Humanitarian Law

CILEM SIMSEK — 6 June, 2016



The present post examines the relationship between human rights law (“HRL”) and international humanitarian law (“IHL”). This relationship will be first analysed from a legal-dogmatic angle, and then in the light of the case-law of the European Court of Human Rights (“the Court”). By focussing solely on the right to derogate from the European Convention on Human Rights pursuant to Article 15, this post will show that the Court’s approach towards the clarification of the said

relationship differs from the practice of other international courts.

The relationship between international humanitarian law and human rights law

Situations of armed conflicts and occupation are governed by two bodies of international law: IHL and HRL. In scholarship and legal practice the relationship between IHL and HRL has been addressed under four main approaches: The 'separatist', 'complementarist' and 'integrationist' approach as well as the *lex specialis* position of the International Court of Justice ("ICJ"). The 'separatists' approach defends the view that both branches should be treated separately (see *inter alia*, M. H. Meyrowitz, Mushkat or KD Suter). 'Complementarists' argue that both branches of law are not identical but complement each other (see *inter alia* E. David or Schindler). 'Integrationists', by contrast, support the merger between both branches since they picture IHL and HRL as belonging to a common branch (see *inter alia* MacBride, GIAD Draper or W. Kälin). The ICJ, for its part, has stated in its Nuclear Weapons Advisory Opinion that IHL is *lex specialis* to HRL in armed conflicts. The prevailing opinion amongst scholars tends to be the 'complementarist' approach whereas the practice of international courts and human rights bodies shows that they favour the approach developed by of the ICJ.

The European Court of Human Rights, by comparison, has avoided clarifying the relationship between IHL and HRL. In the Court's case-law, situations giving rise to a potential interplay of these two branches of international law have been addressed under Article 15 of the Convention, enshrining the right to derogate from the Convention. It

appears therefore of interest to have a brief overview of the Court's case-law on this matter.

The right to derogate from the European Convention on Human Rights pursuant to Article 15 of the European Convention on Human Rights

The derogation clause allows state parties to the Convention to temporarily derogate from their obligation to secure certain rights and freedoms under the Convention. Art. 15 § 1 states that certain derogations may be made in time of war or other public emergency provided that 'such measures are not inconsistent with its other obligations under international law'.

It follows that the activation of this derogation clause requires the existence of a situation that amounts to 'war or other public emergency'. In *Lawless v. Ireland* (no. 3, 1 July 1961, §28), the Court qualified the time of public emergency as 'an exceptional situation of crisis or emergency, which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.' In the 'Greek' case (*Denmark, Norway, Sweden and the Netherlands v. Greece*, 5 November 1969, nos. 3321/67, 3322/67, 3323/67 and 3344/67, §113), the Commission held that, in order to justify such derogation, the emergency should be actual or imminent. Recently, the definition of a public emergency was even expanded in *A. and Others v. the United Kingdom* (19 February 2009, no. 3455/05 §216) to the effect that the menace posed by international terrorism has been considered as a threat to the life of the nation.

Article 15 and the principle of consistency with 'other obligations under international law'

The validity of a derogation measure, however, depends on its consistency with 'other obligations under international law'. The requirement of consistency stated in Article 15 § 1 serves as another safeguard besides the procedural and substantial ones and refers to other branches of international law.

To date, the Court has not found that any derogation measure has ever breached Article 15 § 1 on the basis that it violated rules of IHL. For instance, in Lawless v. Ireland (§41) the Court only made brief reference to IHL, holding that there were no facts that proved that the Irish derogation from Article 5 of the Convention conflicted with any of its obligations under international law.

With respect to military operations in situations of conflict, the Court delivered important judgments towards Turkey regarding Kurdish civilians and Russia regarding Chechens. The most relevant cases in this context concerned civil losses (for instance Ergi v. Turkey, 28 July 1998, no. 66/1997/850/1057 and Isayeva v. Russia, 24 February 2005, no. 57950/00), thus allowing the Court to apply the rules of IHL. However, Turkey and Russia have never declared the state of emergency in relation to these situations of conflict. So, the Court has never had the opportunity to find that these two States have breached Article 15 § 1. Rather, the Court only examined these cases from the perspective of the number of grounds for interference and the principle of proportionality, without considering any potential violation of the law of IHL.

Recently, groundbreaking changes in the case law of the Court could be observed with respect to the derogation clause used in the context of international armed conflicts.

While in the past the Court had avoided to answer the question of whether it considered Article 15 applicable to international armed conflicts (Banković and Others v. Belgium and 16 Other Contracting States, no. 52207/99, § 62), in its very recent judgment Hassan v. the United Kingdom (16 September 2014, no. 29750/09, §104), it has clarified this important legal question.

In that case the Court examined the lawfulness of a deprivation of liberty of a young male by British forces during hostilities in Iraq in the context of the British military operations undergoing in that country. Despite the absence of a formal derogation, the Court took account of the context and the rules of IHL when interpreting and applying Article 5 of the Convention. It further ruled that, even in situations of international armed conflict, the safeguards under the Convention continued to apply, albeit interpreted against the background of the provisions of IHL. The Court said that, by reason of the co-existence of the safeguards provided by IHL and by the European Convention in time of armed conflict, the requirements determining the lawfulness of deprivation of liberty set out under Article 5 should be fulfilled as far as possible and applied conjontly. To put it in other words, the Court decided that detention had to comply with the rules of IHL and most importantly, that it should be in accordance with the fundamental purpose of Article 5 § 1, namely to protect the individual from arbitrariness.

The Hassan judgment can be considered as revolutionary because, for the first time, the Court has not only considered IHL as applying together with the Convention law, but, in this specific case, it has also given it precedence over the latter. It remains to be seen if in the Court will jump on the bandwagon and prioritise this question also in the context of

non-international armed conflicts. The Court might finally have the opportunity to rule on Article 15 § 1 of the Convention from this angle in connection with the “state of emergency” recently declared by France and Ukraine.

A reply to this post can be found [here](#).

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